

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF AGRICULTURE

In the Matter of the Claim Against
the Grain Buyer's Bond of
Mischel Grain & Seed, Warren, MN,
Bond #92770608627589

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing by telephone conference call on May 14, 1998. All parties had the opportunity to present evidence, both testimony and exhibits, to cross-examine witnesses, and to present opening and closing arguments. The record closed at the conclusion of the hearing on May 14, 1998.

Arthur A. Drenckhahn, Esq., of Drenckhahn & Williams, 423 North Main Street, P.O. Box 159, Warren, Minnesota 56762, appeared on behalf of the Claimant, Paul Anderson. James A. Reding, Jr., Esq., of Reding & Pilney, 325 Cedar Street, Suite 814, St. Paul, Minnesota 55101, appeared on behalf of the surety company, Auto-Owners Insurance Company. Paul L. Dinger, Esq., of Lohmann, Nelson, Cole & Stageberg, 80 South Eighth Street, Suite 1800, Minneapolis, Minnesota 55402, appeared on behalf of the principal, Mischel Grain & Seed Co. Paschal O. Nwokocha, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101-2127, appeared on behalf of the Commissioner of the Minnesota Department of Agriculture.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Agriculture will make the final decision after a review of the record, and may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained in this recommended decision. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and to present argument to the Commissioner. Persons should contact the Commissioner of Agriculture, 90 West Plato Boulevard, St. Paul, Minnesota 55107, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

1. Is Paul Anderson entitled to recover against the grain buyer's bond written by Auto-Owners Insurance Company for all of the shipments of seed occurring between March and July 1996 when more than 180 days transpired between the March and April shipments and Anderson's claim filing?
2. Was the agreement between Roger Mischel and Paul Anderson regarding the purchase of Anderson's bin of sunflower seeds a "cash sale" or a "voluntary extension of credit" contract?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Mischel Grain & Seed Company of Warren, Minnesota, was licensed by the Department of Agriculture to buy grain during the license year beginning July 1, 1995 and ending June 30, 1996. Mischel did not renew its grain buyer's license for the period beginning July 1, 1996, but the required grain buyer's bond remained in effect until it was cancelled on February 28, 1997. (Ex. D). The bond was written by Auto-Owners Insurance Company and bears the maximum amount of \$30,000.

2. Paul Anderson is a farmer and has raised a variety of grains, beans and oil seed in the Warren area since 1947. Over the years, Anderson has sold seed to Mischel since Mischel Grain & Seed began operation in Warren in 1980.

3. Anderson and Mischel have always conducted business on the basis of oral agreements and unwritten understandings. Their customary practice was to reach an oral agreement upon the quantity of product to be delivered, a time for delivery, and the price to be paid. Sometimes the delivery time and price were left open for future agreement. When multiple deliveries were required, whether it was a number of deliveries during one day, one week, or over a period of months, their usual course of dealing was for Mischel to pay Anderson only after all the shipments had been delivered.

4. In the spring of 1996, Mischel was looking to purchase sunflower seed. Duane Anderson, Paul Anderson's brother, mentioned to Mischel that Paul had a bin of good quality sunflower seeds he might be willing to sell. Mischel contacted Paul and Paul brought over a sample for Mischel to examine. Based on the sample, Mischel agreed to purchase Paul Anderson's entire bin of sunflower seed. The parties agreed on a price of \$11.25 per hundred weight for the whole bin. Mischel never provided Anderson with a written contract or a written confirmation of a voluntary extension of credit.

5. Because Mischel did not have room in his elevator to take delivery of all the seed, Anderson agreed to deliver the seed in separate shipments. Anderson delivered six shipments in March, six shipments in April and one in July. After each shipment was delivered, the seed was cleaned, bagged and eventually shipped out. When Mischel had room for more, he called Paul Anderson, and more seeds were delivered.

6. When the seeds were delivered to Mischel's plant, a scale ticket was filled out. These tickets are on a standard form, and each of them is numbered separately. The tickets have boxes that can be checked; indicating "sold" or "stored". On another part of the form, there are boxes for "sold", "stored", "GB" and "cont". "Cont." means contract. Between March 12 and April 1, 1996, Anderson delivered six separate shipments of seed to Mischel, totaling approximately 142,900 pounds. Mischel noted on the assembling sheet a price of \$11.25 per hundred weight for the six loads, for a total amount of \$16,078.50. Anderson did not request payment during March or early April, and Mischel did not offer it. Instead, it was understood that these deliveries would be handled pursuant to their customary arrangement. Anderson would be paid in full once

the entire sale was completed. None of the scale tickets for these transactions have either "sold" or "stored" marked, but three of tickets have the "cont." [contract] box checked. (Ex. A).

7. Anderson delivered six more shipments of seed between April 17 and April 23, 1996. These shipments totaled 89,702 pounds. Since the market had gone up, Mischel agreed to pay Anderson \$11.50 per hundred weight, for a total amount of \$10,315.78. As with the earlier deliveries, there was no request for payment or tender of payment for these April deliveries. None of the scale tickets for the April deliveries are marked as either "sold" or "stored". Three of tickets have the "cont." [contract] box checked. (Ex. B).

8. Anderson made no shipments in May or June. On July 22, 1996, Anderson delivered his final shipment of sunflower seed totaling 4877.2 pounds. The market had risen again, so Mischel agreed to pay Anderson \$12.88 per hundred weight, for a total amount of \$6,281.83. The sole scale ticket for July is different from the previous scale tickets. Printed on the form is the question, "Is grain received for storage or on contract and/or sold?" In the box next to that question the word "sold" is handwritten. (Ex. C).

9. All totaled, Anderson delivered to Mischel sunflower seed worth \$32,676.11 in multiple shipments from March through July, 1996.

10. Pursuant to their usual course of dealings over the years, Paul Anderson expected to be paid for all of the shipments soon after his delivery of the last shipment on July 22, 1996. Approximately two or three weeks after the last delivery, Anderson went to see Mischel. Anderson requested payment. Mischel informed him that, due to financial difficulties, he was unable to pay him. Anderson contacted Mischel a few more times, but he never received any money from Mischel for his sunflower seeds. Finally, on December 27, 1996, Anderson filed a proof of claim for \$32,676.11 with the Department's Agricultural Certification Division. (Ex. E). Attached to the proof of claim were the assembling sheets and the individual scale tickets for each of the three months' deliveries.

11. James M. Johnson, a Warehouse Examiner with the Department, reviewed Anderson's claim. Johnson determined each shipment of sunflower seed by Anderson to be a separate cash sale. Johnson based his determination solely on the documents submitted. Johnson did not speak with either Anderson or Mischel before making this determination. As Anderson did not file his claim until December 27, 1996, Johnson found the March and April shipments to be outside the 180 day filing period. Johnson noted that the July scale ticket was within the 180 day limit, so he recommended recovery on the bond for the July shipment only.

12. On June 3, 1997, Johnson issued a claim determination on Anderson's (and others, not at issue here) claims. He allowed the July claim, in the amount of \$6,281.83, but disallowed the March and April claims because they exceeded the 180-day time period. (Ex. D).

13. On June 11, 1997, Anderson's attorney filed an appeal with the Department over the denials of the March and April deliveries.

14. On April 1, 1998, the Department issued a Notice and Order for Hearing, setting the hearing in this matter for May 12, 1998. The hearing date was later changed to May 14, 1998.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Commissioner of Agriculture and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 223.17.

2. That the Department of Agriculture has fulfilled all relevant substantive and procedural requirements of law or rule. In particular, the Department has given proper notice of the hearing in this matter.

3. That the burden of proof is on the Claimant to establish that he is entitled to additional funds by a preponderance of the evidence. Minn. Rules, 1400.7300, subp. 5; 1562.1700, subp. 2.

4. Minn. Stat. § 223.16, subd. 2a, defines "cash sale" as follows:

(a) a sale for which payment is tendered to the seller not later than the close of business on the next business day after the sale, either in cash or by check, or by mailing or wiring funds to the seller's account in the amount of at least 80 percent of the value of the grain at delivery; or

(b) a sale of a shipment of grain which is part of a multiple shipment sale, for which a scale ticket clearly marked "CASH" has been received by the seller before completion of the entire sale, and for which payment is tendered in cash or by check not later than ten days after the sale of that shipment, except that when the entire sale is completed, payment is tendered in cash or by check not later than the close of business on the next business day, or within 48 hours, whichever is later.

5. Minn. Stat. § 223.16, subd. 16, defines "voluntary extension of credit contract" as:

... a contract for the purchase of a specific amount of grain from a producer in which the title to the grain passes to the grain buyer upon delivery, but the price is to be determined or payment for the grain is to be made at a date later than the date of delivery of the grain to the grain buyer. Voluntary extension of credit contracts include deferred or delayed payment contracts, unpriced sales, no price established contracts, average pricing contracts, and all other contractual arrangements with the exception of cash sales and grain storage agreements evidenced by a grain warehouse receipt.

6. Minn. Stat. § 223.17, subd. 4, states, in part, that:

Before a grain buyer's license is issued, the applicant for the license must file with the commissioner a bond in a penal sum prescribed by the commissioner . . .

7. Minn. Stat. § 223.17, subd. 5, provides, in part, as follows:

For a cash sale of a shipment of grain which is part of a multiple shipment sale, the grain buyer shall tender payment to the seller in cash or by check not later than ten days after the sale of that shipment, except that when the entire sale is completed, payment shall be tendered not later than the close of business on the next day, or within 48 hours, whichever is later. ... Any transaction which is not a cash sale in compliance with the provisions of this subdivision constitutes a voluntary extension of credit which is not afforded protection under the grain buyer's bond, and which must comply with sections 223.175 and 223.177.

8. Minn. Stat. § 223.17, subd. 7, provides, in part, that:

A producer claiming to be damaged by a breach of a contract for the purchase of grain by a licensed grain buyer may file a written claim with the commissioner. The claim must state the facts constituting the claim. The claim must be filed with the commissioner within 180 days of the breach of the contract.

9. Minn. Stat. § 223.17, subd. 8(a), provides, in part, that:

The bond required under subdivision 4 shall provide for payment of loss caused by the grain buyer's failure to pay, upon the owner's demand, the purchase price of grain sold to the grain buyer in the manner provided by subdivision 5, including loss caused by failure to pay within the time required.

10. Minn. Stat. § 223.17, subd. 8(b), provides, in part, that:

The Commissioner shall promptly determine the validity of all claims filed and notify the claimants of the determination. An aggrieved party may appeal the commissioner's determination by requesting, within 15 days, that the commissioner initiate a contested case proceeding. In the absence of such a request, or following the issuance of a final order in a contested case, the surety company shall issue payment promptly to those claimants entitled to payment.

11. Minn. Stat. § 223.175 provides as follows:

A written confirmation required under section 223.177, subdivision 2, and a written voluntary extension of credit contract must include those items prescribed by the commissioner by rule. A contract shall include a statement of the legal and financial responsibilities of grain buyers and sellers established in this chapter. A contract shall also include the following statement in not less than ten point, all capital type, framed in a box with space provided for the seller's signature: "THIS CONTRACT CONSTITUTES A VOLUNTARY EXTENSION OF CREDIT. THIS CONTRACT IS NOT COVERED BY ANY GRAIN BUYER'S BOND." If a written contract is provided at the time the grain is delivered to the grain buyer, the seller shall sign the contract in the space provided beneath the statement.

12. Minn. Stat. § 223.177, subd. 2, provides as follows:

Any grain buyer entering into a voluntary extension of credit contract orally or by phone shall give or mail to the seller a written confirmation conforming to the requirements of section 223.175 before the close of the next business day.

13. Minn. Rules 1562.1200, provides, in part, as follows:

The grain purchase receipt must state specifically whether the grain was sold on contract or for cash and the price at which the grain was sold. For contract purchases, if the price is not determined at the time of delivery, then the grain purchase receipt must be marked "price later". ... For the sale of grain designated "contract" on the grain purchase receipt, the grain buyer must put the terms of the contract in writing as required by Minnesota Statutes, section 223.177, subdivision 3. The term "contract" signifies any form of sale except a cash sale. A contract sale of grain is not covered by the grain buyer's bond.

14. Minn. Rules 1562.1300, provides, in part, as follows:

The scale ticket must state specifically whether the grain was sold on contract or for cash and the price at which the grain was sold. If the grain was not sold, then the scale ticket must state whether the grain was received for storage. The term "contract" signifies any form of sale except a cash sale.

15. Mischel never provided Anderson with a written contract or a written confirmation of a voluntary extension of credit conforming to the requirements of Minn. Stat. § 223.175.

16. Mischel and Anderson engaged in a cash sale for Anderson's bin of sunflower seeds. Anderson did not grant Mischel a voluntary extension of credit, nor did Anderson enter into a valid contract for a voluntary extension of credit.

17. The breach of the contract between Mischel and Anderson for the purchase of the sunflower seed occurred on July 24, 1996, within the meaning of Minn. Stat. § 223.17, subd. 7.

18. The multiple shipments of seed were all related parts of one cash sale transaction. Anderson's claim, filed on December 27, 1996, is timely as to all the deliveries between March and July, 1996.

19. Anderson has established, by a preponderance of the evidence, that he is entitled to recover against the grain buyer's bond for all of the shipments occurring between March and July 1996, up to the monetary limit of the bond.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED:

That the Commissioner of Agriculture issue an Order directing Auto- Owners Insurance Company to pay to the Department of Agriculture for the benefit of claimant Paul Anderson the sum of \$30,000, which is the maximum liability of the bond for the licensing period.

Dated this ____ day of June, 1998.

ALLAN W. KLEIN
Administrative Law Judge

NOTICE

Pursuant to Minnesota Statute § 14.62, subdivision 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

In the spring of 1996, Roger Mischel, of Mischel Grain & Seed Co., agreed to purchase an entire bin of sunflower seeds from Paul Anderson. Because Mischel did not have room at his elevator to take delivery of all the seed at one time, Anderson agreed to deliver his sunflower seed in separate shipments. The parties agreed on a price per hundred weight for the whole bin. Anderson delivered six shipments in March, six shipments in April and one in July. Pursuant to their usual course of dealings over the years, Anderson did not expect to be paid by Mischel until the last shipment was delivered. Anderson delivered the last shipment on July 22, 1996. Approximately two or three weeks later, Anderson met with Mischel and requested payment. Mischel informed Anderson that, due to financial difficulties, he did not have the money to pay him.

On December 27, 1996, Anderson filed a claim against Mischel's grain buyer's bond for \$32,676.11. This figure represents the total amount of all the seed Anderson delivered to Mischel between March and July 1996. The Department of Agriculture reviewed the claim and determined each shipment to be a separate cash sale. Consequently, the Department found the March and April shipments to be outside the statutory 180 day filing period of Minn. Stat. § 223.17, subd. 7. The Department allowed recovery on the bond for the July shipment in the amount of \$6,281.83. Anderson filed this appeal.

Minn. Stat. Chap. 223 governs the sale of grain between producers and buyers. Under Minn. Stat. § 223.17, subd. 8(a) (1996), a grain buyer must obtain a bond to compensate the seller for loss caused by the buyer's failure to pay the contract price. The Minnesota supreme court has liberally construed surety bonds in order that they accomplish their statutory purpose of protecting persons who deal with a publicly licensed warehouseman in normal and usual transactions from sustaining loss because

of the warehouseman's default. St. Paul Ins. Companies v. Fireman's Fund Am. Ins. Co., 245 N.W.2d 209, 217 (Minn. 1976).

Paul Anderson, a grain producer, sold to Roger Mischel seed worth \$32,676.11 in multiple shipments from March through July 1996. Both Anderson and Mischel testified that they had conducted similar grain sale transactions over the years and that it was their standard practice that Mischel would not pay Anderson until the last shipment was delivered and the entire sale was completed. Both parties intended this transaction to be a cash sale. The parties did not enter into a written contract for an extension of credit.

Under the bonding statute there are two kinds of grain sales: (1) cash sales, where payment is required to be contemporaneous with the sale; and (2) "voluntary extension of credit" sales. Under extension of credit contracts, the grain seller has no protection under the bond. In order to qualify as an extension of credit sale, the contract must be in writing and must conform to the requirements of Minn. Stat. § 223.175 (1996). This statute requires notice to the seller, in at least ten-point, all-capital type, that by voluntarily extending credit the seller loses coverage under the grain buyer's bond.

The Minnesota court of appeals has held that where the grain buyer does not comply with the statutory requirements of a voluntary extension of credit contract and also fails to meet the technical requirements of a properly completed cash sale, the transaction shall be treated as a cash sale. In re Grain Buyer's Bond No. 877706-08624237, Thomas D. French, d/b/a French Grain Co., 486 N.W.2d 466, 469 (Minn. App. 1992). According to the court, "it is irrelevant that the seller allowed the buyer a grace period, because the buyer must give written confirmation of credit to the seller before the close of the next business day or the transaction fails as a credit sale." Id. There was no evidence presented in this case that Mischel provided Anderson with a written contract or written confirmation of a voluntary extension of credit. Instead, both Anderson and Mischel testified that, as was their custom, they entered into an oral agreement for the sale of Anderson's bin of seed. Consequently, despite the fact that some of the scale tickets were marked "contract", the agreement between Anderson and Mischel failed to meet the statutory requirements of a voluntary extension of credit sale. Pursuant to French, Anderson and Mischel's oral agreement shall be treated as a cash sale.

If there is a breach of a cash sale grain contract, the seller must file a claim with the Commissioner "within 180 days of the breach of the contract". Minn. Stat. § 223.17, subd. 7. Neither the statute nor the rules adopted by the Department define when the breach of the contract occurs. The Department viewed each shipment of sunflower seed by Anderson to be a separate cash sale. The Department based its determination solely on the paperwork submitted. The Department's investigator did not speak with either Anderson or Mischel before reaching this conclusion. As Anderson did not file his claim until December 27, 1996, the Department determined that the March and April "sales" were outside the 180 day filing period.

Anderson argues that the individual shipments of seed should be viewed as related parts of one transaction. Anderson contends that he and Mischel entered into

an agreement for the purchase of Anderson's entire bin of sunflower seeds; not separate cash sales of individual shipments. It was only because Mischel did not have room in his elevator to take delivery of the entire bin, that Anderson delivered the seed in multiple shipments over the course of several months. Anderson maintains that since the contract was for the entire bin, the contract was not completed until the last shipment was delivered. Anderson delivered the last shipment on July 22, 1996. Therefore, according to Anderson, the breach of the entire transaction did not occur until the close of business on the next day.

Moreover, Anderson interprets the clause "except that when the entire sale is completed", in Minnesota Statutes section 223.17, subdivision 5, to mean that the buyer may wait to pay for all the shipments in a multiple shipment cash sale after the last delivery, when the entire sale is completed. The surety, on the hand, interprets this section as merely setting out a payment schedule for multiple shipment sales. According to the surety, this section directs the buyer to pay within 10 days after each shipment and within 48 hours after the last shipment.

The surety urges the ALJ to follow the decision in French, in interpreting Minn. Stat. § 223.17, subd. 5. Like the matter at hand, the French case concerned multiple shipment transactions. In French, the sellers delivered grain to the buyer in separate shipments from February through April 1990. Despite assurances from the buyer, the sellers were never paid in full. The buyer filed for bankruptcy in December 1990 and, shortly thereafter, the sellers filed their claims on the bond. The court of appeals viewed each shipment by the sellers to be separate cash sales, and found that the buyer breached the sales contracts when he did not pay the sellers "at the end of the day after the sales." French, 486 N.W.2d at 470. Thus, the court determined the sellers' claims to be untimely.

The French case, however, can be distinguished from the facts at issue in this matter. Unlike Anderson and Mischel's established pattern of dealing, the ALJ specifically found in French that the buyer ordinarily paid the sellers within one to two weeks after each separate grain delivery. In re Grain Buyer's Bond No. 877706-08624237, OAH Docket No. 1-0400-5642-2 (Findings of Fact, Conclusions and Recommendation issued August 8, 1991; adopted in full by Commissioner on October 31, 1991). Moreover, the sellers accepted partial payments from the buyer from the time they started making deliveries until August 1990. Thus, the evidence in French established that both the grain buyer and the sellers intended each shipment to be a separate cash sale.

Unlike French, the evidence presented in this matter demonstrated that Anderson and Mischel viewed each shipment to be part of one sale. Anderson and Mischel testified that they entered into an oral agreement for the purchase of Anderson's entire bin of sunflower seed. Both also testified that they had conducted similar grain sale transactions over the years and that it was their usual course of dealing for Mischel to pay Anderson only after the last shipment was delivered. Neither Anderson nor Mischel viewed or intended each shipment of seed to be a separate cash sale. Consequently, Anderson was only made aware of Mischel's breach when Mischel did not pay him after the last delivery on July 22, 1996.

The ALJ concludes that that Minn. Stat. § 223.17, subd. 5 can be reasonably interpreted as allowing for payment in a multiple shipment cash sale after each shipment or at the conclusion of the entire sale. In light of the established and customary practices of Anderson and Mischel, and given that the overriding purpose of the statute is to protect farmers who sell and deliver grain to warehousemen, the Judge interprets the statute as allowing for payment at the completion of the entire sale. The Judge concludes that the breach of the cash sale between Anderson and Mischel occurred on July 24, 1996 for purposes of the statute. As Anderson filed his claim on December 27, 1996, his claim is timely as to all of the shipments. Anderson has established, by a preponderance of the evidence, that he is entitled to recover against the grain buyer's bond for all of his shipments between March and July 1996, up to the monetary limits of the bond.

A.W.K.